



## MEMORANDUM FOR THE RECORD

**DATE:** November 20, 2017

**SUBJECT:** Consideration of Potential Economic Impacts for the Proposed Rule: *Definition of “Waters of the United States” – Addition of an Applicability Date to 2015 Clean Water Rule*

### **Regulatory Action**

The Environmental Protection Agency and the Department of the Army (“the agencies”) are proposing to add an applicability date to the “Clean Water Rule: Definition of ‘Waters of the United States’” (80 FR 37054, June 29, 2015) (the “2015 rule”) to two years from the date of final action on this proposal. On October 9, 2015, the Sixth Circuit stayed the 2015 rule nationwide pending further action of the court, but the Supreme Court is currently reviewing the question of whether the court of appeals has original jurisdiction to review challenges to the 2015 rule. On February 28, 2017, the President signed Executive Order (E.O.) 13778, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” With this proposed rule, the agencies intend to maintain the *status quo* by proposing to add an applicability to the 2015 rule and thus provide continuity and regulatory certainty for regulated entities, the States and Tribes, agency staff, and the public while the agencies continue to work to consider possible revisions to the 2015 rule.

### **Related Actions**

The agencies are pursuing a two-step process to implement the guidance in E.O. 13778.

- Step 1: Publication of a proposed rule to recodify the prior regulation. On July 27, 2017, the agencies proposed to recodify the regulation in place prior to issuance of the 2015 rule and currently being implemented under the U.S. Court of Appeals for the 6<sup>th</sup> Circuit’s stay of the 2015 rule. The public comment period closed September 27, 2017 and the rulemaking remains pending as the agencies consider the many comments received.
- Step 2: Development of a New Definition. The agencies plan to consider a new definition to replace the approach in the 2015 rule, as appropriate and consistent with law, and considering the principles that Justice Scalia outlined in the *Rapanos v. United States* (547 U.S. 715, 2006) plurality opinion.

### **Discussion of Economic Baselines**

A necessary step to describing or quantifying the economic impacts is to clearly establish the baseline for the analysis (US EPA 2010, *Guidelines for Preparing Economic Analyses*). There are two approaches to defining the baseline for this proposed rule, discussed in turn below.

The first approach to the baseline is based on the current legal landscape. Currently, the pre-2015 rule regulatory regime is in effect as a result of the Sixth Circuit's nationwide stay of the 2015 rule, which followed a partial stay, affecting 13 states, that was issued by a district court the day before the rule's original effective date. Although this regulatory regime could change at any time (depending on court decisions and actions), to incorporate that in the baseline would require predicting these decisions and actions, and when they might occur. The second approach to the baseline is based on the current Code of Federal Regulations, which contains the 2015 rule regulatory text.

Using the first approach to the baseline, based on the current legal landscape, there are no immediate effects of this proposed rule on the scope of the Clean Water Act and its implementing regulations. The regulatory regime both with and without this rule are the pre-2015 rule regulatory regime. Therefore, there would be no costs, benefits, or other potential impacts under this assumed baseline. However, this proposed rule could reduce uncertainty about the regulatory regime that will be in effect between the time when this proposal is finalized and the sooner of the date that is two years in the future and the completion of the Step 2 rulemaking process.

Changes in interpretation and implementation of which waters are jurisdictional under the Clean Water Act create an uncertain regulatory environment for states, tribes, landowners, and the regulated community. Such uncertainty can have a chilling effect on investment and cause individuals and firms to make strategic decisions that are inefficient from both a private and social standpoint, for example, by delaying project implementation to wait for uncertainty to be resolved, or speeding up projects to take advantage of perceived windows of regulatory-based opportunity. Individuals and firms may also respond by building strategic flexibility into their operations, which can increase costs (Engau and Hoffmann 2009).<sup>1</sup> By proposing to add the applicability date to the 2015 rule, the agencies intend to improve the consistency and stability of the definition of "waters of the United States." Important goals of this action are for the regulated community to have increased certainty about the future regulatory environment and for their decisions and proceed with greater certainty, reducing the need to devote resources to maintaining operational flexibility.

Furthermore, the Supreme Court's resolution of the question as to which courts have original jurisdiction over challenges to the 2015 rule could impact the Sixth Circuit's exercise of jurisdiction and its stay. If, for example, the Supreme Court were to decide that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 rule, the Sixth Circuit case could be dismissed and its nationwide stay would expire, re-animating the partial stay issued by the North Dakota district court and litigation in several other district courts where parties are challenging, and requesting stays of, the 2015 rule. This litigation could lead to inconsistencies, uncertainty, and confusion as to the regulatory regime that would be in effect pending substantive rulemaking under E.O. 13778. The potential patchwork could lead to a significant increase in regulatory uncertainty, even if for a short period of time, and this regulatory uncertainty is not without cost. Absent a great deal more data concerning how various land developers, facility owner/operators, and other regulated entities make decisions about new projects and in light of remaining

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<sup>1</sup> Engau and Hoffman (2009) found that in the case of regulatory uncertainty following the Kyoto Protocol, some firms responded by increasing their strategic flexibility but not postponing decisions, which they hypothesize might have been an effort to add credibility to lobbying activities directed at influencing future regulation.

jurisdictional uncertainty, the agencies are unable to quantify the avoided costs of the reduced regulatory uncertainty. Thus, the agencies' best estimate of the avoided costs and forgone benefits of the proposed rule under this baseline is effectively zero.

The analysis of this proposed rule under a baseline of the 2015 rule (the second baseline approach mentioned above) would be a slight variation on the economic analysis conducted for the Step 1 proposed rule. The world without this proposed rule is the 2015 rule in effect into perpetuity, while the world with this proposed rule would differ in that the 2015 rule would not be in effect for two years. Thus, the annualized costs savings and forgone benefits would be simply two years' worth; these avoided costs and forgone benefits would be summed after expressing them in present value terms. In light of the specific limited time frame of this action, and for the reasons discussed further below, the agencies do not consider this baseline, or such a calculation, to be the most reasonable or useful to decisionmakers and the public.

The agencies' preferred baseline is the first baseline, based on the current legal landscape. This is the basis for the agencies' conclusion that the proposed rule would not be economically significant. A significant reason for choosing this baseline is that the impact of this proposed rule is limited to a relatively short period of time (i.e., the agencies are proposing two years.) Further, in light of the ongoing, complex litigation challenging the 2015 rule, this baseline is a reasonable one because there is uncertainty whether the 2015 rule would be in effect, even for part of the nation, for an extended period of time, if at all. Finally, with this baseline, the agencies are avoiding any possibility of double counting the avoided costs of this proposed rule and the Step 1 proposed rule.